Jointly organised by:

SOCIETY OF CONSTRUCTION LAW MALAYSIA

AIAC
ASIAN INTERNATIONAL ARBITRATION CENTRE

THE INAUGURAL MASTERCLASS
ON ADJUDICATION

📅 7 June 2024, Friday

🕐 9:00am - 6:30pm

📍 Asian International Arbitration Centre & ZOOM

Cocktail Networking Reception sponsor:

SCRIBE

Gold sponsor:

CONTRACT SOLUTIONS-i
ADJUDICATORS & ARBITRATORS

Supporting Organisations:

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MALAYSIAN SOCIETY OF ADJUDICATORS

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PROGRAMME

Time	Activity
9.00am – 9.30am	Registration and Login
9.30am – 9.40am	Welcome Remarks by the Society of Construction Law, Malaysia
9.40am – 10.00am	Keynote Address by Asian International Arbitration Centre
10.00am – 11.00am	**Session 1: "Decoding the Decade: Unveiling the Evolution of CIPAA"**
11.00am – 11.15am	Question and Answer

JUSTICE NADZARIN BIN WOK NORDIN
MODERATOR

RAJENDRA NAVARATNAM
PARTNER, AZMAN DAVIDSON & CO
SPEAKER

SOH LIEH SIENG
FOUNDING PARTNER, CONTRACT SOLUTIONS I PLT
SPEAKER

SANJAY MOHAN
PARTNER, SANJAY MOHAN
SPEAKER

Time	Activity
11.15am – 12.15pm	**Session 2: "Charting the Course: Evaluating the Future of CIPAA"**
12.15pm – 12.30pm	Question and Answer

JUSTICE DATO' LEE SWEE SENG
MODERATOR

KUHENDRAN THANAPALASINGAM
PARTNER, ZUL RAFIQUE & PARTNERS
SPEAKER

THAYANATHAN BASKARAN
PARTNER, BASKARAN
SPEAKER

HOR SHIRLEY
PARTNER, RAJA, DARRYL & LOH
SPEAKER

Time	Activity
12.30pm – 1.30pm	Lunch and Networking
1.30pm – 2.30pm	**Session 3: "Unlocking Insights: Adjudication Regimes Across Borders"**
2.30pm – 2.50pm	Question and Answer

JUSTICE DATO' LIM CHONG FONG
MODERATOR

LAM WAI LOON
PARTNER, HAROLD & LAM PARTNERSHIP
SPEAKER

HO CHIEN MIEN
PARTNER, ALLEN & GLEDHILL SINGAPORE
SPEAKER

BEN DAVIDSON
PARTNER, CORRS CHAMBERS WESTGARTH, AUSTRALIA
SPEAKER

PRISSILLA JOHN
SENIOR CASE COUNSEL ASIAN INTERNATIONAL ARBITRATION CENTRE
SPEAKER

Time	Activity
2.50pm – 4.30pm	**Session 4: The 3 Debates**

JUSTICE DATO' MARY LIM
MODERATOR

VATSALA RATNASABAPATHY
PARTNER ZAIN & CO
DEBATER

FOO JOON LIANG
PARTNER GAN PARTNERSHIP
DEBATER

KEVIN PRAKASH
PARTNER KEVIN PRAKASH
DEBATER

LEONG HONG KIT
MANAGING PARTNER MAC CONSULTANT
DEBATER

ANIZ AHMAD AMIRUDIN
PARTNER CECIL ABRAHAM & PARTNERS
DEBATER

NADESH GANABASKARAN
PARTNER MALEK, GAN & PARTNERS
DEBATER

Time	Activity
4.30pm – 4.45pm	Closing Remarks by President of the Society of Construction Law, Malaysia, Ms Loshini Ramarmuty
4.45pm - 6.30pm	Cocktail Networking Reception

Debate 1

Section 27(1) of CIPAA provides that the adjudicator's jurisdiction is limited to the matter referred to adjudication by the parties pursuant to sections 5 and 6. In **View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22,** the Federal Court ruled that an adjudicator is obliged to consider all the defences raised by a respondent in the adjudication response, even if such defence was not raised in the payment response. Essentially, the respondent is now allowed to raise new defences available to him at the adjudication response stage. Consequently, parties in some instances have opted not to serve a payment response at all, as they can still raise any defences in the adjudication response. It also allows the respondent to reserve their defences until the late stage of the adjudication proceedings.

House A: This House believes that the respondent ought not be allowed to raise new defences at the adjudication response stage given the strict timelines and scheme of adjudication;

House B: This House believes that there is no procedural unfairness to the claimant if the respondent chooses to raise new defences in the adjudication response stage.

Debate 2

In **CT Indah Construction Sdn Bhd v. BHL Gemilang Sdn Bhd [2020] 1 CLJ 75**, the principal (respondent) argued that the sub-contractor was not entitled to seek direct payment from the principal since the main contractor has been wound up. Thus, any direct payment made would amount to undue preference after the presentation of the winding up petition. The Court of Appeal rejected this argument and held that the principal's liability is imposed by statute where the principal has no discretion and the payment made is not from the assets of the main contractor. Further, direct payment is a separate obligation imposed by statute which exists in parallel with the main contractor's obligation to pay the subcontractor under the adjudication decision. Consequently, in some instances parties have deliberately used adjudication as a tool to obtain direct payment when the main contractor is in the verge of winding up. This decision has been perceived to allow the subcontractor to sidestep the usual insolvency regime and pursue the outstanding payments directly from the principal. This brings about the concerns of the superiority of direct payment in CIPAA over the insolvency regime or the pari passu principle.

House A: This House believes that the right to direct payment under section 30 of the CIPAA shall prevail over the insolvency regime's pari passu principle.

House B: This House believes that the direct payment regime under section 30 of the CIPAA is no bigger monster than the long-standing practices in the insolvency regime and the *pari passu* principle.

Debate 3

Various parties have sought, albeit unsuccessfully, to challenge the extent of the prohibition on conditional payment in section 35 of CIPAA. The Courts have been consistent in its interpretation of section 35 notwithstanding the express words used in section 35(2), i.e that the instances of conditional payment are not limited to those in sections 35(2)(a) and (b). The interpretation proffered is wide-reaching with little to no limitation at sight. This approach has been viewed by certain quarters as opening of the floodgates, where any and all conditions imposed on payment would be prohibited. For instance, all conditions would be prohibited even if the conditions relate to the contractor's compliance with statutory requirements, i.e. in relation to foreign workers, or even a condition requiring proof of payment to the sub-contractors. In this context, one can only guess how wide the net can be casted pursuant to section 35 and the implications thereon.

House A: This House believes that everything and anything is prohibited as long as there are conditions imposed on the liability or due date of payment.

House B: This House believes that prohibition on conditional payment should be limited to what was the actual mischief which section 35 sought to remedy, pay-when-paid and pay-if-paid clauses.